

FUNDAMENTALS OF TRIAL ADVOCACY COURSE

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DUI BREATH ANALYSIS ISSUES

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Quick Breath Test Legal References

Admissibility –

- ARS § 28-1323(A) - Breath Test Admissibility Statute

Breath test results are admissible in any trial, action or proceeding with the following foundation:

- 1. A DPS approved device was used.
- 2. The operator was breath test certified on the instrument used.
- 3. Duplicate tests were administered and the test results were within 0.02 alcohol concentration of each other
- 4. The operator who followed the DPS checklist
- 5. The device used to conduct the test was in proper operating condition. (bracketing calibrations on the checklist, monthly calibration records, and/or standard quality assurance records.)
- Evidence Rule 702/*Daubert* (*Deason*). [Rarely used, but sometimes necessary.]

Courts cannot require more than the breath test statutory provisions to admit the breath test

- ARS § 28-1323(B) [Compliance with subsection A of this section is the only requirement for the admission in evidence of a breath test result.]
- *See, State v. Duber*, 187 Ariz. 425, 930 P.2d 502 (App. 1996).
- *See, State v. Superior Court (Stock, RPI)*, 181 Ariz. 202, 888 P.2d 1389 (1995).

Records of periodic maintenance (calibration records, standard quality assurance records, maintenance records) that show the device was in proper operating condition are admissible and are public records.

- ARS § 28-1323(A)(5)

Potential jury instruction addressing records of periodic maintenance

The State has introduced evidence of periodic maintenance through records which show the Intoxilyzer 8000 breath testing device was in proper operating condition at a time before, after and at the time of the tests. Such records are *prima facie* evidence that the device was in the proper condition at the time of the tests.

Source: *State v. Peraza*, 239 Ariz. 140 (App. 2016); *State v. O'Haire*, 149 Ariz. 518 (App. 1986) and ARS 28-1321(A)(5).

The breath testing statute is not unconstitutional

- *State ex rel. Collins v. Seidel (Deason, Real Party in Interest)* 142 Ariz. 587, 691 P.2d 678 (1984).
- *State v. Leonard*, 151 Ariz. 1, 5, 725 P.2d 493 (App. 1986).

The fact that the source code, software, etc. is not available is not a basis for suppression

- ARS § 28-1323(C)
- ARS § 28-1388(B)

The State does not have to collect or preserve a second sample of the suspect's breath when duplicate tests are given.

- ARS § 28-1388(B)
- *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (App. 1993).
- *State v. Bolan*, 187 Ariz. 159, 927 P.2d 819 (App. 1996).

Testimony of the officer will generally satisfy 28-1321(A)(4) even if disputed by the defense. The deprivation period is a part of the checklist & officer testimony of officer is generally sufficient.

- *State v. King*, 213 Ariz. 632, 146 P.3d 1274 (App. 2006).

The breath test statute does not require the same officer to conduct the entire 15-minute deprivation period.

- *State v. Tyszkiewicz*, 209 Ariz. 457, 459 - 60, 104 P.3d 188 (App. 2005).

Lack of foundation objections – person objecting is required to indicate what is lacking.

- *State v. Rodriguez*, 186 Ariz. 240 (1996)
- *State v. Reidhead*, 22 Ariz.App. 420 (1974).

Defendant's refusal of breath (or blood) test is admissible and a question of fact for the jury. (The State should get a jury instruction).

- ARS § 28-1388(D)
- *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989).

Evidence of refusal is not testimonial evidence. The State may comment at trial and argue reasonable inferences.

- *State v. Superior Court (Ahrens, Real Party in Interest)*, 154 Ariz. 574, 578, 744 P.2d 675, 679 (1987).
- *South Dakota v. Neville*, 459 U.S. 553, 556 (1983).
- *Pennsylvania v. Muniz*, 496 U.S. 582 fn 19 (1990).
- ARS § 28-1388(D)

If the MVD Hearing Officer finds the suspect did not refuse the breath (or blood) test, that ruling is not admissible in any later proceeding - including a DUI trial.

- ARS § 28-1321(N)

Good opinions recognizing reliability of duplicate breath tests.

- *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (App. 1993).
- *State v. Bolan*, 187 Ariz. 159, 927 P.2d 819 (App. 1996).

Disagreements between expert witnesses go to the weight, not admissibility.

- *State v. Velasco*, (*Alday*, RPI), 165 Ariz. 480, 486, 799 P.2d 821, 827 (1990).

Where there is a lack of unanimity in the scientific community on the accuracy of a breath test, "the scientific disagreement affects only the weight and not the admissibility of evidence." (Should apply to blood tests also.)

- *State v. Olivas*, 77 Ariz. 118, 267 P.2d 893 (1954).

Court cannot grant a Rule 20 motion for the so-called margin of error. (NOTE: There is no built in 10% margin of error).

- *State ex rel. McDougall v. Superior Court* (*Gurule*, Real Party in Interest), 178 Ariz. 544, 875 P.2d 203 (App. 1994).

Instructing the jury that “records of periodic maintenance are *prima facie* evidence that the breath test instrument was working properly” is appropriate and does not shift the burden.

- *State v. Peraza*, 239 Ariz. 140, 147, 366 P.3d 1030 (App. 2016).
- *State v. O'Haire*, 149 Ariz. 518, 521, 720 P.2d 119, 122 (App.1986).

Breath tests do not have to be collected within two hours. The State may retrograde breath test results administered outside the two-hour window to anytime within the two-hour window.

- *State ex rel. O'Neill v. Superior Court (Kankelfritz, Real Party in Interest)* 187 Ariz. 440, 441, 930 P.2d 517 (App. 1996).
- *State v. Claybrook*, 193 Ariz. 588, 590, 975 P.2d 1101 (App. 1998).

The State is not collaterally estopped from admitting breath test results during a retrial for 28-1381(A)(1) even where a jury previously found the defendant not guilty of violating 28-1381(A)(2).

- *State ex rel. McDougall v. Superior Court (Steen, Real Party in Interest)* 179 Ariz. 279, 877 P.2d 1351 (App. 1994).

Breath test records may be placed on computer storage and this duplicate is deemed an original and is admissible with proper certification.

- ARS § 28-1327
- Records obtained or maintained under ARS § 28-1327 are admissible in any trial, action or proceeding (ARS § 28-1323(D))

An Officer with reasonable suspicion of DUI may request a PBT prior to arrest

- ARS § 28-1322(A)